

***United States Court of Appeals  
for the Second Circuit***



**BRIEF FOR  
APPELLEE**



# 76-1523

To be argued by  
NATHANIEL H. AKERMAN

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**United States Court of Appeals**  
**FOR THE SECOND CIRCUIT**

**Docket No. 76-1523**

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UNITED STATES OF AMERICA,

*Appellee,*

—V.—

JOSE GONZALEZ and JOSE VICENTE COSTANO,  
*Defendants-Appellants.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

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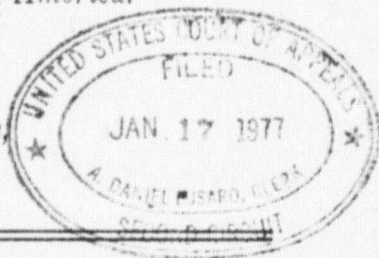
**BRIEF FOR THE UNITED STATES OF AMERICA**

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ROBERT B. FISKE, JR.,  
*United States Attorney for the  
Southern District of New York,  
Attorney for the United States  
of America.*

NATHANIEL H. AKERMAN,  
AUDREY STRAUSS,  
*Assistant United States Attorneys,  
Of Counsel.*



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**BRIEF FOR THE UNITED STATES OF AMERICA**

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**Preliminary Statement**

Jose Gonzalez and Jose Vicente Costano appeal from judgments of conviction entered on October 6, 1976, in the United States District Court for the Southern District of New York, after a four day trial before the Honorable Charles L. Brieant, Jr., United States District Judge, and a jury.

Indictment 76 Cr. 677, filed on July 23, 1976, charged the two defendants in two counts with violations of the federal narcotics laws. Count One charged both defendants with conspiracy to violate the federal narcotics laws commencing on January 1, 1976, and continuing to July 23, 1976, in violation of Title 21, United States Code, Section 846. Count Two charged both defendants

with distributing and possessing with the intent to distribute nine ounces of cocaine on July 15, 1976 in violation of Title 21, United States Code, Sections 812, 841 (a) (1) and 841(b) (1) (A) and Title 18, United States Code, Section 2.

Trial commenced on September 29, 1976. On October 6, 1976, the jury found both defendants guilty on both counts.

On November 4, 1976, Judge Briant sentenced Costano to concurrent terms of imprisonment of eight years on each count to be followed by three years' special parole. Gonzalez was sentenced to ten years' imprisonment on each count, to be followed by three years' special parole, with the sentences to run concurrently.

### **Statement of Facts**

#### **A. The Government's Case**

On July 13, 1976, at 11:45 p.m. Jose Gonzalez entered the Hi-Hat Bar at 858 Eighth Avenue, in Manhattan and met with Louis Sorrentino. Shortly thereafter, Gonzalez left the bar and placed a phone call at a public telephone located at the corner of Eighth Avenue and West 52nd Street. Gonzalez only stated one word into the phone and then hung up the receiver. He then walked around the block and returned to the Hi-Hat Bar. (Tr. 2-3).\*

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\* "Tr." refers to pages in the official transcript; "GX" refers to the Government's exhibits; "Br." refers to the joint brief of the appellants; "Tr. 9/22/76" refers to the pages of the pre-trial conference on September 22, 1976; "H. Tr." refers to the pages of the pre-trial suppression hearing conducted on the defendant Costano's motion to suppress.

Approximately fifteen minutes after the telephone call, Jose Costano appeared on Eighth Avenue, and Gonzalez waved him into the Hi-Hat Bar where both men had a brief discussion with Sorrentino. Following this meeting, Gonzalez and Costano went to the Iberia Restaurant at 250 West 47th Street where they remained for approximately 45 minutes. From the restaurant, Gonzalez and Costano went by taxi to an apartment building at 305 East 24th Street, where Gonzalez used a key to enter the building's rear door. (Tr. 3-5; 468-70).

On the following evening, July 14, 1976, just before midnight, Gonzalez was in front of a coffee shop located on the corner of 52nd Street and Eighth Avenue. After a brief conversation, Gonzalez repeated his pattern of conduct of the previous night. He placed a call from the public telephone located at the corner of Eighth Avenue and West 52nd Street, spoke briefly, hung up the receiver and walked around the same block he had similarly circled the previous evening. He then returned to the Hi-Hat Bar, which he entered. (Tr. 6-7).

Approximately five minutes after Gonzalez had gone into the bar and fifteen minutes after the call had been placed by Gonzalez, Costano exited a taxi cab at the corner of West 51st Street and Eighth Avenue. As he exited the cab he wrapped a magazine around a brown bag which he held in his hands and placed the magazine containing the bag underneath his left arm. Jeffrey Hall, a Special Agent with the Drug Enforcement Administration, then approached Costano, displayed to him his Drug Enforcement credentials and told him he was a Federal Agent. At that point Costano shoved Agent Hall and ran. Costano was subdued and arrested by Agent Hall and several other Special Agents. The bag which Costano had concealed in the magazine under his arm contained nine ounces of cocaine. (Tr. 7-8, 199-203).

To prevent Gonzalez from learning of Costano's arrest, Costano was immediately placed in a Drug Enforcement car and taken to another location where Agent Hall, speaking in Spanish, again identified himself as a Federal Agent, told him he was under arrest for violating the federal narcotics laws, advised him of his Constitutional rights and proceeded to question him. Costano agreed to cooperate. When asked about the cocaine, Costano replied that a man, whom he had met a few days earlier in a bar and whose name he did not know, gave him the bag earlier that evening and told him to deliver it to another man who would be waiting for him near the corner of 51st Street and Eighth Avenue. Costano stated that the set of keys found in his pocket belonged to the man who gave him the cocaine. Furthermore, Costano admitted he was from Colombia and that he was in the United States illegally. (Tr. 8-16).

After Costano had been questioned, Agents Hall and Richard Crawford went to the apartment building at 305 East 24th Street which Gonzalez and Costano had entered the previous evening. Using the keys seized from Costano, the agents found that one of these keys turned the lock for a mail box registered in the name of "J. Gonzalez," Apartment 19G, and that another key turned the lock for Apartment 19G. (Tr. 16-17).

After Costano had been arrested, Gonzalez paced back and forth in front of the Hi-Hat Bar for over an hour and a half during which time he placed two calls at public telephones. When he realized Costano was not going to appear, Gonzalez entered a cab and after a ten to fifteen minute ride arrived at 305 East 24th Street. He went directly to Apartment 19G where he was met by Agents Hall and Crawford who were waiting outside the apartment. Hall asked Gonzalez if he was Jose Gonzalez and if

he lived in Apartment 19G. Gonzalez answered affirmatively and Agent Hall placed him under arrest. Gonzalez admitted the agents to his apartment where he was advised of his Constitutional rights and was questioned. When asked about the keys which the agents had in their possession, Gonzalez said that he had lost them a week or two ago, and when asked where he had been that evening, Gonzalez said he had been at the movies. (Tr. 16, 18-20, 472-74).

Both Gonzalez and Costano were brought to the headquarters of the Drug Enforcement Administration for processing. At approximately 2:30 a.m., Gonzalez was sitting in one of the interview rooms and Costano was brought to the doorway of that room. After facing each other, each was asked out of the other's presence if he knew the other, and each responded that he had never known and had never seen the other man. (Tr. 21-26).

The next day, July 15th, Gonzalez and Costano were individually questioned at the United States Attorney's Office. At that time both defendants admitted knowing each other. In fact Gonzalez said that he gave Costano refuge for one night because he did not have anywhere to go. With respect to the cocaine, Costano stated that he received it from a man named Johnny Ortiz whom he had met in a bar and who had asked him to deliver it to another man at 51st Street and Eighth Avenue. Costano claimed that Ortiz mentioned something to him about assisting him in getting a job. Costano also stated that he had been in the United States for approximately four days and had never been in this country previously. Gonzalez again claimed that he had been at the movies the previous evening. Although he could not remember the name of the movie, he described the title of the movie as having something to do with the devil and the woman.

Gonzalez also stated that he had never done any business with Costano and had never asked him to take a package for him. (Tr. 251-62, 268-70).

## **B. The Defense Case**

Gonzalez did not present a case, but Costano called Abby Robinson, a free lance photographer, to identify photographs taken by her on September 27, 1976, at the location near the Hi-Hat Bar where Costano had been arrested. (Tr. 401-10). Two of these photographs were admitted into evidence. (Tr. 586).

## **ARGUMENT**

### **POINT I**

#### **The Motion to Suppress the Nine Ounces of Cocaine Seized from Costano on July 15, 1976, Was Properly Denied**

Costano claims that his arrest was not based upon probable cause, and that therefore the search incident thereto was invalid.\* Specifically, Costano's argument is that since the informant in this case had not previously given information sufficient to demonstrate his reliability, the information he gave did not constitute probable cause to arrest Costano. In making this argument, Costano relies primarily upon the decisions of the Supreme Court

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\* Costano appears to concede that if the arrest was valid, the search was properly incident thereto. *United States v. Edwards*, 415 U.S. 800 (1974); *United States v. Robinson*, 414 U.S. 218 (1973); *Gustafson v. Florida*, 414 U.S. 260 (1973); *Chimel v. California*, 395 U.S. 752 (1969).

in *Aguilar v. Texas*, 378 U.S. 108 (1964), and *Spinelli v. United States*, 393 U.S. 410 (1969). Costano's position has absolutely no merit.

### **A. Facts**

In the late afternoon of July 13, 1976, Richard Crawford, a Special Agent with the Drug Enforcement Administration received a telephone call at his office from a confidential informant. The informant told Crawford that at approximately midnight a Colombian male, about 35 to 40 years old, medium build, would be at the High-Hat Bar on Eighth Avenue in New York City to meet with Louis Sorrentino to arrange for the purchase of one-quarter kilogram of cocaine. At 11:15 p.m. that same day Agent Crawford met with the informant in the vicinity of West 54th Street and 10th Avenue. The informant confirmed that this meeting between the Colombian male and Sorrentino was still scheduled to take place. (H. Tr. 50-51).

At approximately 11:30 p.m. Agent Crawford and Agent Hall entered the Hi-Hat Bar and observed Sorrentino present in the bar. Ten minutes later a Latin male matching the description given by the informant entered the bar and spoke to Sorrentino. (This Latin male was later identified as the defendant Jose Gonzalez.) After a five to ten minute conversation, Gonzalez left the bar followed by Agent Hall. (H. Tr. 51-53).

Agent Crawford then met with the informant in the men's room of the Hi-Hat Bar. The informant told Agent Crawford that Gonzalez would be receiving a sample of cocaine from another Colombian male and that sample would be given to Sorrentino. (H. Tr. 53).

After Gonzalez exited the bar, he placed a call from a public telephone on the corner of 57th Street and Eighth Avenue, walked around the block and returned to the bar. (H. Tr. 94).

At approximately 12:15 a.m. Gonzalez reentered the bar and five or ten minutes later Gonzalez again exited the bar and signalled another Latin male from across the street who walked over to meet Gonzalez. (This second Latin male was the defendant Costano.) Both Gonzalez and Costano entered the Hi-Hat Bar. Ten minutes later Gonzalez and Costano left the Hi-Hat Bar and were followed by Agents Crawford, Hall and Kelley to the Iberia Restaurant on West 47th Street where they entered. (H. Tr. 53-54).

When Gonzalez and Costano entered the Iberia Restaurant, Agent Crawford received a message over his radio that the informant had called his number at the Drug Enforcement Administration to say that he had the sample of cocaine given to Sorrentino. Agent Hall maintained surveillance at the Iberia Restaurant and Agents Crawford and Kelley left to meet the informant. The informant gave Agent Crawford a small plastic bag containing a small amount of cocaine, stating that this was the sample of cocaine that had been delivered to Gonzalez and that Gonzalez had given to Sorrentino. The informant also told the Agents that at midnight of the next evening Sorrentino would receive delivery of a quarter kilogram of cocaine from Gonzalez at the Hi-Hat Bar. The informant said that this delivery would take place in the same way the sample had been delivered. Gonzalez would arrive at the Hi-Hat Bar and once it was apparent that the deal was set to take place, he would telephone his contact, Costano, who would make the delivery. (H. Tr. 55-57).

At the conclusion of their meeting with the informant Agents Crawford and Kelley rejoined Agent Hall outside the Iberia Restaurant and at approximately 1:45 a.m. Gonzalez and Costano left the restaurant. They took a cab to Second Avenue and East 25th Street and went into the rear entrance of 305 East 24th Street. The security man at that building told the Agents that the only person who would have access to the rear door on East 25th Street was someone who lived in the building. (H. Tr. 57-58).

On July 14, 1976, at 11:15 p.m. Agent Crawford met with the informant in the vicinity of West 54th Street and Tenth Avenue. The informant confirmed that the meeting was still scheduled to take place that night between Sorrentino and Gonzalez. (H. Tr. 59-60).

At approximately 11:45 Agents Crawford, Magnuson, Hall, Kelley, Smith and Pavichavich established surveillance at the Hi-Hat Bar. About ten minutes later, Gonzalez stood in front of the Hi-Hat Bar and then walked to the corner of 52nd Street and Eighth Avenue where he spoke briefly to Sorrentino. Gonzalez left Sorrentino, made a call from the same public telephone he had used the previous evening and repeating his conduct of the previous evening, walked around the block and returned to the front of the Hi-Hat Bar. (H. Tr. 60).

At approximately 12:15 a.m. Costano arrived in a cab at the corner of Eighth Avenue and 51st Street. Before exiting the cab Costano wrapped a magazine around a paper bag so as to conceal the paper bag and placed it under his arm. Agent Hall approached Costano, displayed his badge and told him he was under arrest for a violation of the Federal narcotics laws. Costano shoved Agent Hall and tried to run away, but was subdued by

Agents Crawford, Magnuson, Pavichevich and Hall. The bag which Costano had concealed in the magazine was found to contain nine ounces of cocaine. (H. Tr. 5, 61-62).

All of the information which the informant had received relative to this particular case and which he had relayed to Agent Crawford had been received by the informant from the defendants Costano and Gonzalez. (H. Tr. 93).

In addition to the investigation involving the instant case, Agent Crawford had received information from this informant on two occasions prior to July 13, 1976. On one occasion the informant gave him the name, address and unlisted telephone number of an individual whom he claimed was involved in narcotics trafficking. Crawford checked the telephone number with the New York telephone company and verified that the unlisted telephone number was registered to the address which had been furnished by the informant. On the second occasion, the informant gave Crawford a description of a car and license number. A check of the license plate with the Motor Vehicle Bureau of the State of New York revealed that it was registered to the same type of car which the information had described. (H. Tr. 66-67, 69-70).

**B. The Arrest of Costano Was Based Upon Probable Cause to Believe that He Was and Had Been Dealing in Narcotics**

*Aguilar* and *Spinelli* hold that in order for probable cause to be based upon an informant's tip, the Government must show (1) that the informant received his information in a reliable way and (2) that the informant was

"credible." In satisfying the first part of this test, the Supreme Court's later decision in *United States v. Harris*, 403 U.S. 573, 579 (1971) made it clear that personal observation satisfies the requirement that the information be reliably obtained. In this case all of the information relayed by the informant to Agent Crawford was based on first-hand communications from Gonzalez and Castano. The requirement that the information be reliably obtained was thus met. *Mapp v. Warden*, 531 F.2d 1167, 1171 (2d Cir. 1976); *United States v. Viggiano*, 433 F.2d 716, 719 (2d Cir. 1970), *cert. denied*, 401 U.S. 938 (1971).

The issue raised by Costano invokes the second prong of the test, namely, whether the informant was credible. Costano claims that he was not simply because he did not have a previous track record of furnishing information which led to convictions. (Br. 20).\*\*

However, in determining whether an informant is "credible" under *United States v. Harris*, *supra* at 581-82, the informant need not have a previously reliable track record as an informant. What is crucial, is "whether the informant's *present* information is truthful or reliable . . ." *United States v. Harris*, *supra*, 403 U.S. at 582. In this connection, the Second Circuit

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\* Thus, this case is unlike *United States v. Karathanos*, 531 F.2d 26 (2d Cir. 1976), *cert. denied*, 44 U.S.L.W. 3762 (July 6, 1976) in which this Court found that there was no probable cause for the issuance of a search warrant because the supporting affidavit failed to show that the informant had first-hand knowledge of the alleged criminal activity on the defendant's premises.

\*\* At the suppression hearing the Government argued that the informant's prior track record adequately showed that he was credible. Although the District Court specifically ruled to the contrary, the fact that the informant had provided reliable information on two separate prior occasions should have been sufficient to meet the test of credibility.

has held on numerous occasions that independent corroboration of the principal elements of an informant's statement constitutes a demonstration of reliability, in the absence of a track-record of previous reliability. *Mapp v. Warden*, *supra*, 531 F.2d at 1171; *United States v. Canestri*, 518 F.2d 269, 272 (2d Cir. 1975); *United States v. Rollins*, 522 F.2d 160, 165 (2d Cir. 1975); *United States v. Caniesco*, 470 F.2d 1224, 1231 (2d Cir. 1972); *United States v. Sultan*, 463 F.2d 1066, 1069 (2d Cir. 1972); *United States v. Manning*, 448 F.2d 992, 998-99 (2d Cir.), *cert. denied*, 404 U.S. 995 (1971); *United States v. Dzialak*, 441 F.2d 212, 216 (2d Cir.), *cert. denied*, 404 U.S. 883 (1971); *United States v. Acarino*, 408 F.2d 512, 515 (2d Cir.), *cert. denied*, 395 U.S. 961 (1969); *United States v. Unger*, 469 F.2d 1283, 1287 (7th Cir. 1972), *cert. denied*, 411 U.S. 920 (1973).

Moreover, in evaluating probable cause, evidence sufficient to corroborate an informant need not, as Costano suggests, be evidence which actually establishes the crime itself. This Court so held in *United States v. Sultan*, 463 F.2d 1066, 1069 (2d Cir. 1972) with respect to a previously unknown informant stating as follows:

"An untested informant's story may be corroborated by other facts that become known to the affiant, even if they corroborate only innocent aspects of the story."

This precise language was recently quoted with approval in *United States v. Rollins*, *supra*, 522 F.2d at 165.

In this case, virtually every fact related to Agent Crawford by the informant was fully corroborated by Crawford and the other agents prior to the arrest of Costano. These facts include the informant's description

of Gonzalez by nationality, age and physical size and his tip that there would be a meeting between a Colombian and Sorrentino at the Hi-Hat Bar prior to midnight on July 13, 1976. The informant's additional information, provided to Crawford immediately after this meeting, that Gonzalez would be receiving a sample of cocaine from another Colombian male to give to Sorrentino was corroborated by Gonzalez' telephone call and the arrival shortly thereafter of Costano, the meeting of Gonzalez, Costano and Sorrentino and the subsequent receipt by Crawford of the sample of cocaine from the informant. Furthermore, the informant's information that the sale of the quarter kilogram of cocaine would take place on the following night in the exact same fashion as the delivery of the sample was proven to be precisely correct right up to Costano's arrest. On that second night, the pattern of conduct of the previous night repeated itself. Gonzalez arrived at the Hi-Hat Bar at approximately midnight and met with Sorrentino. Gonzalez left the bar, placed a phone call, walked around the block and waited in front of the Hi-Hat Bar. Fifteen minutes later Costano showed up in a taxi cab a short distance from the Hi-Hat Bar carrying a small brown bag which he attempted to conceal by wrapping in a magazine and placing it under his arm .

Indeed, even if neither of the two tests under *Aguilar* and *Spinelli* had been satisfied, the overwhelming corroboration of the informant in this case would have been sufficient by itself to establish probable cause. In *United States v. Canieso, supra*, a Special Agent of the Bureau of Narcotics and Dangerous Drugs received information from an informant in Bangkok, Thailand that the defendants on November 10, 1971, would attempt to smuggle a large quantity of heroin into the United States. As a result of that information, the agent went to the Bangkok

Airport on November 9th where he observed both of the defendants. The agent followed the defendants on to a plane which flew to New York via London. Until the defendants actually cleared customs in New York with their luggage, neither one overtly acknowledged knowing the other. Although the defendants had nodded to each other once during the flight and one had appeared to be following the other at certain times, they arrived at the airport separately, sat in separate seats on the plane, and went through United States Customs separately. Once outside the airport, the defendants took a cab together to a hotel where they entered the same room and were shortly thereafter arrested. In a suitcase belonging to the defendants was found thirty-four pounds of heroin. Solely on the basis of the corroboration of the informant's information and the suspicious inferences arising from the defendants' conduct, this Court held that there was sufficient probable cause to arrest the defendants, stating as follows:

*"Aguilar* applies with full rigor only when the search warrant on the arrest depends solely on the informer's tip. When a tip not meeting the *Aguilar* test has generated police investigation and this has developed significant corroboration on other *"probative indications of criminal activity* along the lines suggested by the informant" . . . the tip, even though not qualifying under *Aguilar*, may be used to give such additional color as is needed to elevate the information acquired by police observation above the floor required for probable cause." 470 F.2d at 1231. (Citations omitted).

In this case the corroboration of the informant is even stronger. Not only are the informant's details care-

fully corroborated step by step but, unlike *Canieso*, the agents here actually received a sample of the drug from the informant. In view of the fact that one prong of the test of *Aguilar* and *Spinelli* were already satisfied in this case by the fact that the informant obtained his information first-hand, there can be no doubt that the substantial corroboration of his information was sufficient to permit the arrest of Costano.

**C. Judge Brieant Did Not Abuse His Discretion in Refusing to Require the Government at the Suppression Hearing to Divulge the Identity of the Informant or to Hold an *In Camera* Hearing on the Reliability of the Informant**

Finally, Costano asserts that Judge Brieant erred by refusing to require the Government to reveal the name of the informant at the suppression hearing and by refusing to examine the reliability of the informant in an *in camera* hearing. His claim is unsupported by the law in this Circuit.

This Court has held in no uncertain terms that for the purpose of a suppression hearing the identity of the informant need not be disclosed and an *in camera* hearing need not be held when "on the scene corroboration of key elements of an informer's tip serves as an additional safeguard against fabrication." *United States v. Carneglia*, 468 F.2d 1084, 1089 (2d Cir. 1972), *cert. denied*, 410 U.S. 945 (1973). See also *United States v. Edmonds*, 535 F.2d 714, 720 (2d Cir. 1976); *Mapp v. Warden*, *supra*, 531 F.2d at 1173; *United States v. Comissiong*, 429 F.2d 834, 839 (2d Cir. 1970). As demonstrated in Point I, *supra*, every key element of the informant's information in this case was corroborated by on the scene physical

surveillance by Special Agents of the Drug Enforcement Administration on two separate occasions prior to Costano's arrest.\* Thus, Judge Briant properly exercised his discretion in refusing to require the Government to disclose the identity of the informant and in refusing to hold an *in camera* hearing on the informant's reliability.

## POINT II

### **Judge Briant Did Not Abuse His Discretion in Refusing to Require the Government, under the Circumstances of this Case, to Divulge the Identity of the Informant at Trial**

Costano and Gonzalez assert that Judge Briant erred in not requiring the Government to disclose the name and address of the informant or to produce him at trial and in not conducting an *in camera* hearing on the informant. Defendants, for the first time, argue in this Court that the informant alone had the information concerning their knowledge and intent with respect to charges of conspiracy and possession. This argument is devoid of merit.

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\* In his argument Costano relies, in part, on Supreme Court Standard 510-Identity Of Informer, to argue that under its provisions he would have been entitled to an *in camera* inquiry. However, Costano acknowledges that "Congress refused to specifically adopt... [standard 510] when it recently adopted the new Federal Rules of Evidence" (Br. 24), and, in any event, it directly supports the Government's position in that if "the judge is not satisfied that the information was received from an informer reasonably believed to be reliable or credible, he may require the identity of the informer to be disclosed." In this case Judge Briant properly exercised this discretion and made a specific finding that the informant was reliable on the basis of the corroboration of his information (H. Tr. 141-42).

The courts have long recognized a governmental privilege to withhold from disclosure the identity of persons who furnish information about violations of law. See *Scher v. United States* 305 U.S. 251, 254 (1938); *In Re Quarles*, 158 U.S. 532 (1895); *Vogel v. Gruaz*, 110 U.S. 311, 316 (1884); 8 Wigmore, Evidence § 2374 (McNaughton Rev. 1961). This privilege encourages citizens to furnish information concerning the commission of crimes by preserving their anonymity and also enables the Government to continue to utilize professional informants whose usefulness would come to an end if their dual role were publicly revealed.

In *Roviaro v. United States*, 353 U.S. 53, 60-61 (1957), the Supreme Court stated that:

"Where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way."

In explaining the rule, the Court went on to say:

"We believe that no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defense, the possible significance of the informer's testimony, and other relevant factors." 353 U.S. at 62.

In *United States v. Soles*, 482 F.2d 105, 109 (2d Cir.), cert. denied, 414 U.S. 1027 (1973), this Court, observing

that the Supreme Court had been careful to qualify the standard it set forth in *Roviaro*, stated:

"Both reason and context demonstrate, however, that these words are not to be read with extreme literalness. Determining whether the testimony of an informer is likely to be 'relevant and helpful' is a task best left to the trial court's informed discretion."

Under the circumstances of this case, Judge Briant did not abuse his discretion in refusing to require the Government to reveal the informant's identity or to conduct an *in camera* hearing. At trial the defendants merely called for the identification of the informant (Tr. 173) and made absolutely no showing that the disclosure of the informant's identity would assist their case or that this disclosure was essential to their receiving a fair trial. This Court has held that a defendant must make some showing beyond a mere request for disclosure. *United States v. DeAngelis*, 490 F.2d 1004, 1010 (2d Cir.), *cert. denied*, 416 U.S. 956 (1974); *United States v. Ortega*, 471 F.2d 1350, 1359 (2d Cir. 1972), *cert. denied*, 411 U.S. 948 (1973); *United States v. Casiano*, 440 F.2d 1203, 1205 (2d Cir.), *cert. denied*, 404 U.S. 836 (1971); *United States v. Russ*, 362 F.2d 843, 845 (2d Cir.), *cert. denied*, 385 U.S. 923 (1966); *United States v. Coke*, 339 F.2d 183, 184-85 (2d Cir. 1964); *United States v. Maniello*, 345 F. Supp. 863, 882 (E.D.N.Y. 1972). The burden is on the defendants to show why the privilege should not apply in a particular case, not as the defendants suggest, for the Government to show that disclosure would present a danger to the informant. Indeed, this Court has held that "[a]s long as the privilege not to disclose the identity of the informer remain[s] operative, no inference [can] be drawn against the

government for not calling him to testify . . . ." *United States v. Coke, supra*, 339 F.2d at 185.

Moreover, there was no evidence or claim by the defendants at trial to suggest that the informant played a central role in the crimes charged other than to tip off Crawford about the cocaine deal scheduled to be consummated at the Hi-Hat Bar.\* This Court has specifically held that disclosure of the identity of the informant is not required where the informant's role in the crime is not "intricately involved in the transaction of . . . [the] case." *United States v. D'Amato*, 493 F.2d 359, 366 (2d Cir.), *cert. denied*, 419 U.S. 826 (1974). See also *United States v. De Angelis, supra*, 490 F.2d at 1010; *United States v. Ortega, supra*, 471 F.2d at 1357; *United States v. Russ, supra*, 362 F.2d at 844-45.

Since the defendants failed to articulate a single relevant justification for disclosure of the identity of the informant, the trial judge can hardly be said to have abused his discretion in balancing the competing policies and determining that disclosure should not be required. See *United States v. Alexander*, 495 F.2d 552 (2d Cir. 1974); *United States v. Ortega, supra*, 471 F.2d at 1357-58; *United States v. Casiano, supra*, 440 F.2d at 1204-05; *United States v. Russ, supra*, 362 F.2d at 845-46; *United States v. Coke, supra*, 339 F.2d at 184; *United States v. Simonetti*, 326 F.2d 614, 616 (2d Cir. 1964); *cf. United States v. De Angelis, supra*, 490 F.2d at 1010.

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\* The evidence at trial showed that the only other person involved in the sale of the cocaine was Louis Sorrentino. Although both the Judge and defense counsel expressed their belief that Sorrentino may have been the informant (Tr. 168-70), no effort was made by the defense counsel to subpoena him despite the fact that his name and address had been furnished to them two weeks before trial in a Drug Enforcement Administration report. (Tr. 298, 529-31).

Apparently discontent with the record they made on this issue in the trial court the defendants now claim, for the first time and without giving any details, that the informant's testimony was crucial to whether they had the requisite knowledge and intent to be guilty of the crimes of conspiracy and possession. The argument suffers not only from the defendants' failure to present it to the trial judge, but also from the fact that the informant was not the only person who could testify to matters relative to the defendants' knowledge and intent. Louis Sorrentino, who met with both Gonzalez and Costano on the first night and Gonzalez on the second night, could have been called by the defendants to testify but for some reason was not.

Finally, the bald allegation that the informant had relevant information on the issues of intent and knowledge which would have vindicated the defendants is unsupported by any facts and, as such, is nothing more than sheer speculation. See *United States v. D'Amato*, *supra*, 493 F.2d at 366; *United States v. Soles*, *supra*, 482 F.2d at 105; *United States v. Russ*, *supra*, 362 F.2d at 845; *United States v. Coke*, *supra*, 339 F.2d at 184-85; *United States v. Simonetti*, *supra*, 326 F.2d at 616. Indeed, if the informant had any exculpatory testimony to offer, his name would have been furnished to the defendants pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963).

### POINT III

#### **Costano's Post-Arrest Statements Were Properly Admitted into Evidence**

Defendant Gonzalez asserts that reversible error was committed by the admission into evidence of Costano's post-arrest statements. Specifically, Gonzalez argues (1) that prior to trial the Government stipulated that it would not introduce into evidence post-arrest statements of either defendant; (2) that the admission into evidence of Costano's statement about the keys violated Gonzalez' Sixth Amendment right to confront his accuser as enunciated in *Bruton v. United States*, 391 U.S. 123 (1968); and (3) even if the statement was admissible under *Bruton*, the Government during summation improperly used this statement as evidence against Gonzalez.

#### **A. There Was No Stipulation by the Government prior to Trial that It Would Not Use Any of the Post-Arrest Statements of the Defendants**

The record is abundantly clear that the Government did not enter into a stipulation or agreement or make any representation that post-arrest statements of the defendants would not be offered into evidence. As Gonzalez acknowledges, the Government in response to the defendants' motions for a severance filed an affidavit on September 16, 1976, which unequivocally stated that "the Government does not intend to offer at trial any statements inadmissible under *Bruton v. United States*, 391 U.S. 123 (1968)." In the pretrial conference on September 22, 1976, the Government reiterated this position on the record in the presence of Frederic Lewis who was then Mr. Gonzalez' counsel. On the following day, Sep-

tember 23, 1976, Nathaniel H. Akerman, the Assistant United States Attorney in charge of this case, telephoned Mr. Lewis and told him that, in light of the case law, it was the Government's position that none of the post-arrest statements made by either defendants fell within the prohibitions of *Bruton*, and that if he believed otherwise, he should raise his objections with the court as to particular statements, (Akerman Affidavit, filed September 16, 1976, p. 1; Akerman Affidavit, filed October 29, 1976, p. 9). Mr. Lewis did not raise any such objections with the court, and did not make any further court appearance after that pre-trial conference. At trial Gonzalez was represented by Lee Robbins, a partner of Mr. Lewis'.

Gonzalez' only support for his claim that the Government agreed not to offer into evidence his or Costano's post-arrest statements at trial is the Government's response to a question by the court at the September 22nd pre-trial conference which Gonzalez takes completely out of context. Judge Brieant asked the Government whether the Government intended "... to use any statement in the absence of the co-defendant taking the stand?" The Assistant responded, "[a]bsolutely not". (Tr. 9/22/76, 9), but immediately after this statement Mr. Akerman referred to the Government's affidavit filed in opposition to the defendants' motions and told the judge that he had discussed this matter with Mr. Lewis. (Tr. 9/22/76, 9-10).\*

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\* The full text of this exchange reads as follows:

Mr. Lewis: I don't know whether it is Mr. Akerman's intention to use any type of conversation, or I don't know of any conversation or statement allegedly made by Mr. Costano which may affect Mr. Gonzalez, but if it is his intention to use such statement I would object to same, in that we have no way of calling Mr. Gonzalez to the stand, and we have—

The Court: I thought I discussed that with you the last time you were all here. Are you intending to use any

[Footnote continued on following page]

trial by Mr. Robbins, Judge Brieant specifically found that the Government was simply repeating its representation that it would not offer into evidence any statement prohibited by *Bruton*. (Tr. 304-05). Indeed, counsel for the defendant Costano who was also present at the September 22nd pretrial conference was obviously not under any misapprehension that the Government would not offer into evidence Costano's post-arrest statements, since at that time he asked for and received a suppression hearing to determine the admissibility of those statements. (Tr. 9/22/76, 16-18, 31, Hr. 137-41).

Finally, even if the Government had represented that it would not use the defendants' post-arrest statements—a matter which we do not concede—Gonzalez has totally failed to show how he was prejudiced in any way by his misunderstanding. Prior to trial, the Court specifically found that Costano's statements were made voluntarily (Tr. 137-41), and at trial counsel for Gonzalez had ample opportunity to object to the admission of these statements. Indeed, as a result of Gonzalez' objections Judge Brieant specifically instructed the jury that Costano's statements could not be used against Gonzalez. (Tr. 9-11, 23, 24, 252, 257, 261, 618, 540-41). Thus, even if defense counsel believed before the trial that this evidence would not be offered, his misapprehension was corrected in time for him to register his objections.

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statement in the absence of the co-defendant taking the stand?

Mr. Akerman: Absolutely not, your Honor.

The Court: Haven't you had a discussion with Mr. Lewis?

Mr. Akerman: I have. I discussed all these and submitted an affidavit to Mr. Lewis and to the Court, answering all these items. I said the exact same things in my papers. (Tr. 9/22/76, 9-10).

**B. The Admission into Evidence of Costano's Statement that the Keys in his Possession Belonged to the Man Who Gave Him the Cocaine Did Not Violate Gonzalez' Rights under *Bruton***

Agent Hall testified that after Costano was arrested a set of keys was found in his pockets and when questioned about these keys (GX 2), Costano stated that the keys belonged to the man who gave him the cocaine. (Tr. 15). Subsequent investigation disclosed that one of these keys turned the lock in Gonzalez' mail box and another key turned one of the locks for Gonzalez' apartment. (Tr. 17). When Costano's post-arrest statements were received in evidence, Judge Brieant specifically instructed the jury that Costano's statements were "admissible only with respect to the charges against Mr. Costano" and were not to be considered by them as evidence against Gonzalez. (Tr. 9). During the course of the trial and in his charge to the jury at the conclusion of the trial, Judge Brieant instructed the jury nine more times that it could only consider the post-arrest statements against the defendant who made them. (Tr. 10-11, 23, 24, 136, 252, 257, 325, 618, 640-41).

In *Bruton* the Supreme Court held that such limiting instructions may be ineffective in a joint trial when a defendant's post-conspiracy statement incriminates a co-defendant and the defendant who made the statement does not take the stand. For a limiting instruction to be ineffective, however, the post-conspiracy statement must be "clearly inculpatory" of the co-defendant and it must be "vitally important to the Government's case." *United States v. Wingate*, 520 F.2d 309, 313 (2d Cir. 1975), *cert. denied*, 423 U.S. 1074 (1976); *United States v. Catalano*, 491 F.2d 268, 273 (2d Cir.), *cert. denied*, 419 U.S. 825 (1974); *United States v. Cassino*, 467 F.2d 610,

623 (2d Cir. 1972), *cert. denied*, 410 U.S. 928 (1973). Costano's statement concerning the keys was neither "clearly inculpatory" of Gonzalez nor "vitally important to the Government's case" against Gonzalez.

Since Costano did not specifically name Gonzalez as the owner of the keys or as the man who gave him the cocaine, his statement is not "clearly inculpatory" of Gonzalez. *United States v. Cassino, supra*, 467 F.2d at 623; *United States v. Wingate, supra*, 520 F.2d at 313. Indeed, at the same time Costano made this statement about the keys he said he did not know the name of the man who gave him the cocaine, but on the following day in an interview in the United States Attorney's Office, he said the man who gave him the cocaine was Johnny Ortiz. When taken in its entire context, Costano's statement can reasonably be interpreted to be that the keys belonged to Johnny Ortiz.

The fact that independent evidence, however, established that two of the keys turned Gonzalez' mailbox and apartment door locks does not make Costano's statement "clearly inculpatory" of Gonzalez. The law is abundantly clear that "a defendant's statement is admissible at a joint trial, with cautionary instructions, even though other evidence in the case indicates that an unmentioned co-defendant was also involved in the activities described in the statement." *United States v. Wingate, supra*, 520 F.2d at 314; *United States v. Trudo*, 449 F.2d 649, 652-53 (2d Cir. 1971), *cert. denied*, 405 U.S. 926 (1972); *United States ex rel. Nelson v. Follette*, 430 F.2d 1055, 1058 (2d Cir. 1970), *cert. denied*, 401 U.S. 917 (1971).

In the *Follette* case, *supra*, this Court held that a post-arrest statement by a co-defendant naming the defendant Nelson as "Oliver" was not "clearly inculpatory" because it was independent evidence adduced at trial that proved

that "Oliver" was an alias for Nelson. *United States ex rel. Nelson v. Follette, supra*, 430 F.2d at 1058. Similarly, in this case independent evidence, not Costano's statement, proved that the keys belonged to Gonzalez. Since Costano's statement about the keys standing alone does not serve by itself to connect Gonzalez to the cocaine, the statement is not "clearly inculpatory."

Moreover, Costano's statement about the keys can hardly be said to be "vitally important to the Government's case" against Gonzalez. Although the case against Gonzalez was based on circumstantial evidence, the evidence was overwhelming to support his conviction on the two charges. Gonzalez' and Costano's pattern of conduct over July 14th and 15th clearly demonstrated that Costano was telephoned by Gonzalez to bring the nine ounces of cocaine to the Hi-Hat Bar. Moreover, after his arrest Gonzalez made a number of false exculpatory statements which cannot be explained other than as consciousness of guilt. Despite overwhelming evidence that he had been at the Hi Hat Bar all evening, Gonzalez told the agents at the time of his arrest that he had been at the movies that night. Gonzalez claims that he was lying about where he had been in the presence of his wife because he had been in "an area populated with prostitutes." (Br. 37). This does not, however, explain, the fact that Gonzalez elaborated on that same statement the next day in the United States Attorney's Office without his wife being present. This time Gonzalez added that the movie had something to do with the devil and the woman. At the time of his arrest Gonzalez was also asked about the keys which the agents had seized from Costano, and Gonzalez falsely stated that he had lost the keys a week ago. Even more significantly when Gonzalez was actually confronted with Costano in person, and asked whether he knew him, he denied ever having seen or known him

despite the overwhelming evidence that on the previous evening Costano and Gonzalez had been in each other's company at the Hi Hat Bar and the Iberia Restaurant and had gone to and entered Gonzalez' apartment building.

Finally, even if the admission into evidence of Costano's statement about the keys was a violation of *Bruton*, it constituted nothing more than harmless error since the other evidence against Gonzalez was so overwhelming and Costano's statement was merely cumulative. *Harrington v. California*, 395 U.S. 250, 254 (1969).

### **C. The Government Did Not Improperly Use Costano's Statement About the Keys Against Gonzalez During Summation**

Gonzalez' claim that the Government improperly used Costano's statement about the keys against him during summation does not square with the record. In its summation to the jury, the Government divided its summation into four distinct parts specifically addressing the evidence which answered the following four questions: 1) Did Costano possess the cocaine? (Tr. 541-42); 2) Did Costano conspire with another person? (Tr. 542-45); 3) Did Gonzalez conspire with Costano? (Tr. 545-50); and 4) Did Gonzalez possess the cocaine? (Tr. 551). The only time the Government mentioned Costano's statement about the keys was to answer the question of whether Costano conspired with another person. (Tr. 543-44). At no time during its summation did the Government ask the jury to consider this statement by Costano as evidence against Gonzalez on either the question of conspiracy or possession. In its rebuttal the Government only once mentioned Costano's statement about the keys in recapping the evidence only as to Costano. (Tr. 617-18).

Finally, even if the Government had improperly used Costano's statement about the keys against Gonzalez, Judge Brieant's cautionary instructions after each use of this statement obviated any error in this case. In each of the two instances where the Government referred to Costano's statement about the keys, Judge Brieant, as a result of objections by Gonzalez' attorney, instructed the jury in no uncertain terms that Costano's statement could not be used by them as evidence against Gonzalez in considering Gonzalez' case. (Tr. 544-45, 618). As set forth above, cautionary instructions in this case were wholly adequate to protect Gonzalez. *United States v. Wingate, supra*, 520 F.2d at 313; *United States v. Catalano, supra*, 491 F.2d at 273; *United States v. Casino, supra*, 467 F.2d at 623.

#### POINT IV

##### **There Was No Prosecutorial Misconduct**

Gonzalez and Costano contend that their convictions must be reversed because prosecutorial misconduct denied them their right to a fair trial. Specifically, the defendants claim that it was prosecutorial misconduct for the Assistant United States Attorney (1) to use during summation Costano's statement that the keys in his possession belonged to the man who gave him the cocaine; (2) to refer to Gonzalez during summation as the likely brains behind the cocaine transaction and as the likely person who was responsible for Costano's presence at 51st Street and Eighth Avenue; and (3) to elicit testimony from Agent Hall that Costano after his arrest stated he was an illegal alien. All of these arguments are totally frivolous.

As demonstrated above, there was absolutely nothing improper about the admission into evidence of Costano's

statement about the keys or the use of that statement by the Assistant United States Attorney during the summation. The statement did not violate Gonzalez' rights under *Bruton v. United States*, 391 U.S. 123 (1968) and the Assistant United States Attorney in the two times he referred to this statement in his summation restricted its use solely as evidence against Costano.

As to the argument that Gonzalez was the prime mover in this case, the full statement in the summation to this effect was as follows:

"the evidence is clear that Mr. Costano dealt with somebody else and that Mr. Costano conspired. That brings us to Mr. Gonzalez over there, the gentlemen wearing the tie, the gentlemen wearing the suit. The guy who is probably the brains behind this operation, the guy who is probably—who was responsible for Mr. Costano showing up at 51st Street and Eighth Avenue." (Tr. 545).

Gonzalez' counsel did not object to this comment when it was made. The undisputed law in this circuit regarding the propriety of summations to the jury is that "[w]ithin broad limits, counsel for both sides are entitled to argue the inferences which they wish the jury to draw from the evidence." *United States v. Dibrizzi*, 393 F.2d 642, 646 (2d Cir. 1968). See also *United States v. Ong*, Dkt. No. 76-1087, slip op. 5517, 5538 (2d Cir., Sept. 14, 1976); *Malley v. Connecticut*, Dkt. No. 76-2072, slip op. 1029, 1035 (2d Cir., Dec. 20, 1976); *United States v. Gerry*, 515 F.2d 130, 144 (2d Cir.), cert. denied, 423 U.S. 832 (1975). In this case there was strong evidence, albeit circumstantial, that Gonzalez was the man in charge of the cocaine transaction charged in the indictment. Included in this evidence was the overwhelming inference that it was Gonzalez who summoned Costano by

telephone to the Hi Hat Bar with the cocaine. There was also evidence that Costano was not a resident of the United States and would not have been likely to know where to sell the cocaine. Indeed, after his arrest, Costano claimed to have been in the United States only four days, and Gonzalez who had been a resident of New York City stated after his arrest that he had given refuge to Costano for one night in his apartment. Thus, since the statements made by the Assistant United States Attorney during his summation concerning Gonzalez were supported in the evidence, they hardly rise to the level of a violation of due process in which "the prosecutor's remarks were so prejudicial as to deprive the defendant of a fair trial". *Malley v. Connecticut*, *supra*, slip op. at 1035.\* Moreover, this Circuit has held that failure by defense counsel to raise an objection at trial to the prosecutor's summation precludes consideration of that point on appeal. *United States v. Ong*, *supra*, slip op. at 5538; *United States v. Canniff*, 521 F.2d 565, 572 (2d Cir. 1975), *cert. denied*, 423 U.S. 1059 (1976); *United States v. Perez*, 426 F.2d 1073, 1081 (2d Cir. 1970), *aff'd*, 402 U.S. 146 (1971); *United States v. Dibrizzi*, *supra*, 393 F.2d at 645-46.

Finally, there was nothing improper about eliciting upon the testimony of Agent Hall that Costano had stated

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\* *United States v. Burse*, 531 F.2d 1151 (2d Cir. 1976), the only case cited by Gonzalez in support of his argument, dealt with an extremely egregious prosecutorial abuse and is thereby readily distinguishable from the instant case. In *Burse* this Court stated that the Assistant United States Attorney made false and misleading statements, came close to commenting on the defendant's failure to take the stand, referred to items not in evidence and made improper comments about defense counsel. No such allegations have been advanced by Gonzalez in this case, nor are any such allegations supported by the record.

that he was in the United States illegally. (Tr. 14). When Agent Hall was asked, "Did Mr. Costano tell you anything about his alien status in the country?", Costano's counsel did not object but after the answer was given simply asked the judge to instruct the jury that Costano was not on trial for being an illegal alien. (Tr. 14). Judge Brieant gave this instruction and further instructed the jury that the question of being an illegal alien "calls for a conclusion of law . . . which neither you nor this witness is properly able to make" and that "any person in this country has the same protection of the United States Constitution and its laws, whether he is here properly or not." (Tr. 14-15).

Although the defendant argues that this statement was inflammatory, the Government put this statement into evidence in the interests of completeness. The statement was exculpatory in that it supported Costano's anticipated defense that he did not possess the cocaine "knowingly".\* On the basis of this statement about being an illegal alien, Costano could have argued that the reason he ran from Agent Hall when Hall identified himself as a federal officer was because he was afraid of being deported as an illegal alien. The Government, however, did argue that Costano's attempt to flee evidenced guilty knowledge that the brown bag he was carrying contained cocaine. (Tr. 620). Furthermore, even though Costano's counsel asked for the curative instruction and now claims his client's statement about being an illegal alien was inflammatory, he used this statement himself during his summation to argue that the only crime his client was guilty of was being in the United States illegally. (Tr. 605). Finally, even if the

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\* Indeed, in his summation, Costano's counsel claimed that his client was simply a delivery boy and did not know what was inside the brown bag at the time of his arrest. (Tr. 607, 613).

statement was inflammatory, it is not a ground for reversal since defense counsel failed to object at the time the question was asked and once the answer was elicited defense counsel did not move for a mistrial but instead asked for curative instructions. These instructions more than adequately removed any prejudice resulting from Costano's statement. *United States v. Pfingst*, 477 F.2d 177, 188 (2d Cir.), *cert. denied*, 412 U.S. 941 (1973); *United States v. Sawyer*, 469 F.2d 450 (2d Cir. 1972).

### CONCLUSION

**The judgment of conviction should be affirmed.**

Respectfully submitted,

ROBERT B. FISKE, JR.,  
*United States Attorney for the  
Southern District of New York,  
Attorney for the United States  
of America.*

NATHANIEL H. AKERMAN,  
AUDREY STRAUSS,  
*Assistant United States Attorneys,  
Of Counsel.*

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AFFIDAVIT OF MAILING

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COUNTY OF NEW YORK) ss.:

Nathaniel H. A Kerman being duly sworn,  
deposes and says that he is employed in the office of  
the United States Attorney for the Southern District  
of New York.

That on the 17<sup>th</sup> day of January, 1977,  
he served a copy of the within brief by placing the same  
in a properly postpaid franked envelope addressed:

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And deponent further says that he sealed the said envelope  
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Sworn to before me this

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Olga C. Grampp

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Qualified in Richmond City  
Comm. Expires March 30, 1977